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No. 87-29

In the Supreme Court of the United States

OCTOBER TERM, 1987

SABAH SENAWI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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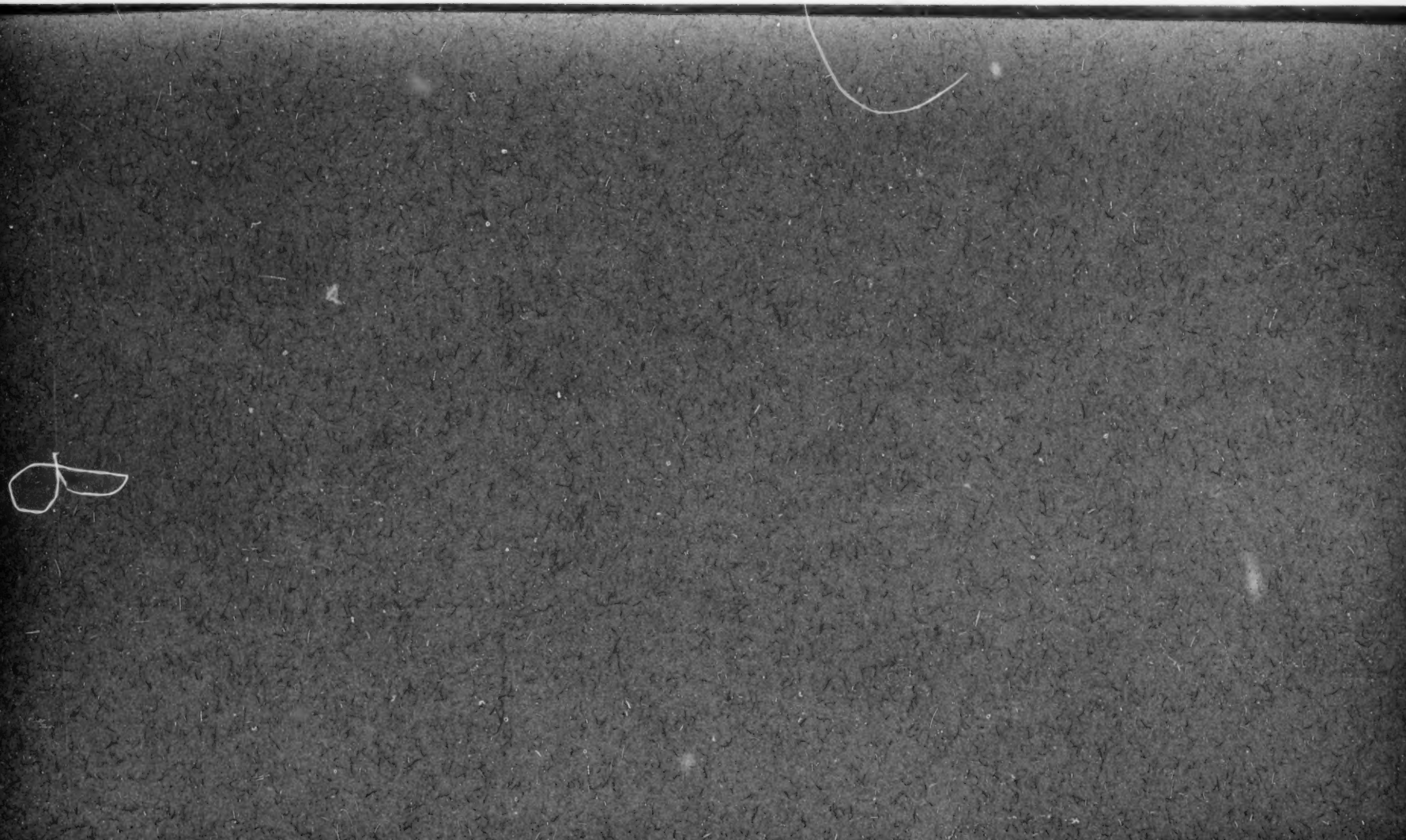

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by the jury's experimentation with an exhibit during its deliberations.

2. Whether the district court properly denied petitioner's motions for a new trial based on newly discovered evidence and on the government's alleged failure to disclose exculpatory evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The court's judgment is noted at 816 F.2d 683 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1987. A petition for rehearing was denied on May 20, 1987. The petition for a writ of certiorari was filed on July 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of maliciously damaging a building by fire, in violation of 18 U.S.C. 844(i), and on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of four years' imprisonment

on the malicious damaging count and three years' imprisonment on each of the mail fraud counts.

1. On June 11, 1984, at 8:19 p.m., petitioner left work for the day and locked the doors of a grocery store in which he and his mother-in-law each owned a one-half interest (C.A. App. 192). Ten minutes later, the store's burglar alarm system lost power. A subsequent investigation showed that the alarm wires, which were at ceiling level, had burned. *Id.* at 94-95, 193-194. Twenty-four minutes after petitioner left the store, a passerby reported the fire, which the fire department extinguished approximately 40 minutes later (*id.* at 226, 582). Petitioner subsequently submitted insurance claims totalling $850,240.69 based on damages caused by the fire (see *id.* at 3).

At trial, government expert witnesses testified that the fire commenced in four separate places on wooden pallets containing grocery items, which were placed against the interior wall of a storeroom running along the left side of the building (C.A. App. 209, 443, 578, 581-582, 611-625; see Pet. App. 12a (diagram)). The chief of the local fire department testified that he discovered an open, half-empty bottle of lighter fluid on the floor in front of a meat cooler along the back wall of the shopping area. Above, he discovered two grocery items that the fire had not reached; both were covered with a flammable hydrocarbon liquid resembling lighter fluid. C.A. App. 435-436, 439, 445, 598.

Petitioner's expert witness testified that the fire had started hours or even days earlier in faulty wiring on the display case side (not the storeroom side) of the dividing wall. According to that witness, the fire had then spread up the wall on the display side, and had finally burned through the wall to the storeroom, where it ignited the ceiling. Petitioner's witness testified that pieces of the ceiling then fell in the storeroom and started the four individual fires. C.A. App. 376-379, 409-412.

During cross-examination of an arson investigator who was testifying on behalf of the government, petitioner introduced into evidence a ceiling tile similar to those found in the store (C.A. App. 309). The witness agreed with petitioner's counsel that the tile would burn "if enough fire is applied to it" and that the fire in petitioner's store had been hot enough to ignite the ceiling and the wooden grid supporting it (Pet. App. 13a; C.A. App. 313, 317-318)). The witness also stated that he "d[id]n't know that [the ceiling tile] would burn readily by holding a match to it. There'd probably have to be some sustained heat to ignite it" (Pet. App. 13a). Finally, the witness testified that if burning ceiling tiles had fallen and caused fires directly below, he would have expected to see a clean unburned spot under the fallen tile and evidence of fire in many places where the tiles had fallen. According to the witness, no such spots were found after the fire, and there was no evidence of fire in many places where tiles had fallen. C.A. App. 287, 327-328.

During cross-examination of that government witness, petitioner's counsel initially advised the court that he wished to attempt to burn the tile with a match—as he had done in his office (Pet. App. 13a). The government witness testified that a match would "probably flare up" the edge of the tile, but that holding a match directly to the center would not "get much penetration of burning" (*id.* at 14a). Petitioner's counsel did not attempt the demonstration. He stated that he would "do it a different way, rather than run any risk here," and that he would "find some other device" (*id.* at 15a). Petitioner's counsel did not subsequently undertake a demonstration.

2. a. Following his conviction, petitioner filed a motion for a hearing concerning possible jury misconduct (C.A. App. 5-6). Petitioner alleged that there was evidence that jurors had attempted to test, in the jury room, the combustibility of the ceiling tile that had been introduced

into evidence. Examination of the tile revealed a scorch mark that apparently was not present when the tile was introduced into evidence and allowed into the jury room. Petitioner alleged that a combustibility test by the jury during its deliberations constituted an improper introduction of extraneous prejudicial information, which entitled him to a new trial.

The district court denied the motion after a hearing (Pet. App. 7a). The court found (*ibid.*) that any scorching of the tile did not constitute extraneous prejudicial information because the tile had been admitted into evidence and the flammability of the tile did not bear on the "central issue" in the case. At the hearing on the motion, petitioner's counsel declined to explain how the jury experiment could have had any prejudicial impact; counsel instead maintained that prejudice could be determined only after an evidentiary hearing devoted to an examination of the incident (C.A App. 80).

b. Petitioner subsequently filed a motion for a new trial based on newly discovered evidence (C.A. App. 35-43). Petitioner alleged that he had recently learned that the two firemen who first entered the burning building would testify that they had seen only one fire in the storeroom; that a fireman overheard arson investigators at the firehouse saying that they had been successful in stopping fires by Arab-Chaldean businessmen and that the Arab in this case was not going to get away with it; and that a fireman had found the lighter fluid in the fire chief's car and put it in the garbage, from which it was subsequently retrieved. *Id.* at 37-39.

The district court denied petitioner's motion (Pet. App. 8a-9a). The court concluded (*id.* at 8a) that "[t]here is no reasonable probability that * * * [petitioner's proffered] information would have resulted in a different outcome" to the case. The court also found (*id.* at 8a-9a) that the government had not "withheld" the information from peti-

tioner, and the court rejected petitioner's claim that the government had engaged in prosecutorial misconduct.

3. The court of appeals affirmed in a per curiam opinion (Pet. App. 1a-3a). The court held (*id.* at 2a) that although the district court may have erred in declining to hold a hearing to determine whether extrinsic evidence had been introduced, the error was harmless. According to the court (*ibid.*), petitioner had failed to make a sufficient showing of prejudice. The court further found (*id.* at 2a-3a), based on its own "independent review of the record * * * that even if the jury did conduct the experiment and this may have involved introduction of extraneous evidence, [the] evidence was harmless." The court rejected petitioner's other claims without discussion (*id.* at 3a).

ARGUMENT

1. Petitioner contends (Pet. 6-25) that he is entitled to a new trial because the district court failed to hold an evidentiary hearing to consider the impact on the verdict of the apparent effort by the jury to test the combustibility of the piece of ceiling tile that was admitted into evidence. He argues (*id.* at 6-19) that the court of appeals erred in not presuming that the jury's experimentation on the tile had a prejudicial impact on the jury and that the court's decision in this respect conflicts with decisions of other courts of appeals. The decision of the court of appeals, however, is correct, and it does not properly present a conflict among the circuits.

a. No evidentiary hearing was necessary in this case. Both the district court and the court of appeals were willing to assume that the jury had in fact performed an experiment with the ceiling tile during its deliberations. See Pet. App. 2a, 7a. An evidentiary hearing would have added little, if anything, more because, as petitioner concedes (Pet. 18), Fed. R. Evid. 606(b) would have barred

any juror testimony regarding the impact of the experiment on the jury's deliberations. See *Tanner* v. *United States,* No. 86-177 (June 22, 1987), slip op. 8-11; *Rushen* v. *Spain,* 464 U.S. 114, 121 n.5 (1983); see also *Mattox* v. *United States,* 146 U.S. 140 (1892). Petitioner's assertion (Pet. 24) that an evidentiary hearing would not now be an "effective procedure" to determine the prejudicial impact of the experiment was equally true at the time of petitioner's motion.

b. Contrary to petitioner's claim (Pet. 6-19), this case also does not properly present the existing conflict between the Sixth Circuit and other circuits over whether extraneous information introduced into the jury room is "presumptively prejudicial." We agree with petitioner that such a conflict exists. The Sixth Circuit, unlike other circuits, has concluded that the presumption of prejudice established by this Court's decision in *Remmer* v. *United States,* 347 U.S. 227, 229 (1954), is no longer good law in the aftermath of this Court's more recent decision in *Smith* v. *Phillips,* 455 U.S. 209 (1982). We also agree with petitioner that the Sixth Circuit's view is incorrect.[1] This is not an appropriate case in which to address the circuit conflict, however, because a correct reading of *Phillips* would not have altered the result in this case.

First, the jury's experiment with the ceiling tile did not bear on any significant issue in dispute in the case and therefore could not have prejudiced petitioner. At trial, petitioner claimed that the fire had been caused by a fault

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[1] As we explained in our opposition to the petition for a writ of certiorari in *United States* v. *Pennell,* 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985), we believe that the Sixth Circuit has misread this Court's decision in *Smith* v. *Phillips.* We share the view expressed by Judge Celebrezze's dissent in *Pennell* that *Phillips* did not alter the *Remmer* presumption that extrinsic influence on the jury is prejudicial; rather the Court simply stressed, consistent with *Remmer* (see 347 U.S. at 229), that the presumption was not conclusive and it was not a substitute for a showing of actual bias. See U.S. Br. in Opp. at 7, *Pennell* v. *United States, supra.*

in the electrical wiring and that burning ceiling tiles had spread the fire to three separate areas in the store through "fall-down" (Pet. 3). The government did not attempt to rebut this defense by suggesting that the ceiling tiles were not combustible. A government expert agreed that the ceiling tiles were combustible and that the ceiling had caught fire (C.A. App. 316-319). Other government witnesses agreed that ceiling tiles had been burned in the fire (see, *e.g.*, *id.* at 232, 233-236). The dispute at trial focused on how the fire was caused, not on where it had spread.[2]

In any event, even if the jury experiment with the tile had a sufficient bearing on a genuine issue of material fact to trigger the presumption of prejudice under *Remmer,* the court of appeals' failure to apply that initial presumption would not provide a ground for reversal in this case. The court of appeals' inquiry into actual prejudice resulted in a determination that would have rebutted any such presumption. As the court of appeals observed (Pet. App. 2a-3a), one of the witnesses at trial intimated that such an experiment would not simulate actual fire conditions; he agreed that the fire would have been sufficient to ignite the tile, but he also stated that a match could not ignite the

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[2] The government's evidence that arson was the cause of the fire was principally: (1) the close proximity in time between petitioner's departure from the store and the start of the fire (C.A. App. 94-95, 192); (2) the presence of a container of lighter fluid and flammable liquid on certain products (*id.* at 435-436, 439, 445, 498); (3) the absence of any clean (unburned) spots on the bottom of the ceiling tiles that had landed on the floor (which a government witness testified undercuts petitioner's claim that the ceiling tiles had started the four separate fires) (*id.* at 326-327); (4) the absence of any signs of fire in other locations where tiles had fallen (*id.* at 287); and (5) petitioner's motive (outstanding debts and his subsequent insurance claims) (see *id.* at 2-3). One government witness did maintain that the fire was not in progress long enough "to travel from one area, go along the ceiling, fall down, pick up, travel over to another area, fall down, travel and then go over to another area" (*id.* at 620).

center of the tile.[3] Contrary to petitioner's claim (Pet. 24), therefore, even if the jury was considering "how readily the ceiling tile could be ignited," the jury is unlikely to have attached any meaningful weight to its experiment.

2. Petitioner also contends (Pet. 25-29) that he should have been granted a new trial because the government failed to disclose exculpatory evidence and because of petitioner's discovery of new evidence after the trial (*ibid.*). The court of appeals correctly rejected this claim.

a. As the district court found (Pet. App. 8a-9a), the government did not withhold any exculpatory information from petitioner that warrants a new trial. First, the district court specifically found (*id.* at 8a) that petitioner had prior knowledge of the identity of the two witnesses (the two firemen who first arrived at the fire) who petitioner claims would have provided exculpatory testimony. Petitioner therefore could have himself obtained their testimony prior to trial. Second, as the district court further found (*ibid.*), any statements obtained by the government from these witnesses that were not turned over to petitioner were not exculpatory. As the government represented to the court of appeals, the government provided a copy of Van Horn's written statement to petitioner's counsel prior to trial, and neither Van Horn's written or oral statement nor Agee's oral statement addressed the issue whether either witness had seen one or more fires. See C.A. App. 109 (Agee).

In any event, even assuming that the statements of the two witnesses currently proffered by petitioner had previously been in the government's possession and had then been withheld from petitioner, they still would not be

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[3] This testimony was provided during petitioner's cross-examination of a government witness and not, as the court of appeals mistakenly stated (Pet. App. 2a-3a), by one of petitioner's witnesses.

"material" because there "is [no] reasonable probability that had the evidence been disclosed to the defense, the result of the proceedings would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985). According to the transcripts upon which petitioner relies (C.A. App. 96-109, 659-668), the two firemen would testify that they saw only one fire, which was on the storage side of the partition, and not on the display side. The significance of their noticing only one fire, however, is undercut by their testimony concerning the poor visibility at the scene (*ibid.*).

In addition, contrary to petitioner's assertion (Pet. 23), Van Horn did not testify that "the fire appeared to start from electrical causes"; he disclaimed any view on the cause of the fire. And, although Agee did state his view that the fire was caused by a "shorting out," his opinion was expressly premised on the fact that he could "see no other way that a fire [could] start on a pallet like that" (C.A. App. 102). The possibility of arson, however, plainly contradicts that premise.

Finally, as the district court concluded (Pet. App. 8a), the proffered testimony actually "continues to support the government's case." In particular, both firemen testified (C.A. App. 98, 663, 666) that the fire was located in the storage room and not in the display room. That testimony directly contradicts the theory of petitioner's expert, who testified that the fire commenced on the display room side of the dividing wall (see C.A. App. 376-379, 409-412).

b. Similarly unpersuasive is petitioner's claim (Pet. 27-29) that he is entitled to a new trial based on newly discovered evidence. New evidence that the fire chief stored the container of lighter fluid in his car overnight and had to have the container retrieved from the garbage the next day does not dispute the key aspect of his testimony, which was that he found the container at the scene. Nor does the new evidence cast doubt on the further

damaging testimony that two grocery items covered with a flammable hydrocarbon liquid resembling lighter fluid were discovered near the container. See C.A. App. 445, 598.

New evidence that one of the government's witnesses had previously made a statement concerning the commission of arson by "Arab-Chaldean businessmen" (C.A. App. 39) likewise falls short of that necessary to call for a new trial, which requires at least a " 'reasonable probability' " of acquittal (cf. *United States* v. *Bagley*, 473 U.S. at 682). Such remarks, even if they were made, would not significantly reduce the credibility of that witness's conclusion that arson caused the fire because, as petitioner admits,[4] that conclusion was corroborated by the testimony of numerous other expert witnesses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1987

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[4] See Pet. 3 & n.3 (citing C.A. App. 209-210 (Lewis); *id.* at 578 (Silvani); *id.* at 443 (Parker); *id.* at 604, 624-625 (Tackett); *id.* at 264, 286, 288 (McClary); 7 Tr. 32 (McClary)) ("The Government's witnesses stated that the fire did not spread by burning along the ceiling or igniting separate areas as burning materials fell down.").

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